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Supreme Court of the United States

WORLD TRADE CENTER FAMILIES FOR PROPER BURIAL, INC., KURT HORNING, DIANE HORNING, ANTHONY INGRASSIA, GLORIA INGRASSIA, ARTHUR RUSSO, ARLENE RUSSO, JAGDISH BHUKHAN, INDIRA BHUKHAN, CATHERINE REGENHARD, ALBERT REGENHARD, MONICA GABRIELLE, ROSEMARY CAIN, KRISTEN BREITWEISER, MINDY KLEINBERG, LORIE VAN AUKEN, WILLIAM DOYLE, SR., CAMILLE DOYLE,

Petitioners,

v.

THE CITY OF NEW YORK, MICHAEL R. BLOOMBERG, Mayor of the City of New York, JOHN J. DOHERTY, Commissioner of the New York City Department of Sanitation, AMANDA BURDEN, Chair of the New York City Department of City Planning,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STEVEN J. HYMAN
AIMEE E. SAGINAW
MCLAUGHLIN & STERN, LLP
260 Madison Avenue
New York, NY 10016
(212) 448-1100

NORMAN SIEGEL
Counsel of Record
260 Madison Avenue,
18th Floor
New York, NY 10016
(212) 532-7586
siegel@mclaughlinstern.com

Attorneys for Petitioners

230045

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

The Second Circuit affirmed the district court's holding that: (1) Petitioners had no due process property interest in the unidentified remains of their deceased next-of-kin who died at the World Trade Center on September 11th; and (2) any incidental burden on Petitioners' religious practices imposed by Defendants' actions in implementing the recovery effort did not rise to the level of a Free Exercise violation, both because Defendants' actions did not target religious beliefs and because Defendants' actions were justified by a compelling government interest.

Three questions are presented:

1. Is there a due process property interest in the unidentified remains of the dead for burial purposes, where two Circuit Courts have found such a property interest in identifiable remains, the unidentifiable remains are undisputedly known to be present in a specific location, and the underlying purpose behind such a property interest – so as to allow next-of-kin to bury their loved ones in a decent and dignified manner – is still present?

2. At what point does a "special relationship" arise between a government and its citizens which provides citizens protection under the Due Process Clause?

3. Are Free Exercise rights violated when, as a result of governmental actions or policies, one is prevented from participating in that most central of religious rituals – the burial of one's dead in accordance with one's religious tenets?

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Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. 1991) 18, 19, 20

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Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 31

Colavito v. New York Organ Donor Network, Inc., 356 FSupp.2d 237 (E.D.N.Y. 2005) 21

Daniels v. Williams, 474 U.S. 327 (1986) 31

Darcy v. Presbyterian Hospital in City of New York, 202 N.Y. 259 (1911) 21

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Dick v. City of New York, No. 607/00, 2002 WL 31844745 (N.Y. Sup. Oct. 30, 2002) 21

Cited Authorities

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Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) 35

Goldberg v. Kelly, 397 U.S. 254 (1970) 31

Hellenic American Neighborhood Action Committee v. City of New York, 101 F.3d 877 (1996) 31

Helmer v. Middaugh, 191 F.Supp.2d 283 (N.D.N.Y. 2002) 21

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Mansaw v. Midwest Organ Bank, No. 97-9271-CV-W-6, 1998 U.S. Dist. LEXIS 10307 (W.D. Mo. 1998) 19

Melfi v. Mount Sinai Hosp., 64 A.D.3d 26, 877 N.Y.S.2d 300 (1st Dep't 2009) 21

Melton v. Hamilton County, 267 F.Supp.2d 859 (S.D. Ohio 2003) 18-19

Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1 (1978) 20, 31

Cited Authorities

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Newman v. Sathyavaglswaran, 287 F.3d 786 (9th Cir. 2002) 18, 19, 20

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Rumsfeld v. Forum for Academic & Inst. Rights, Inc. (FAIR), 547 U.S. 47 (2006) 17

Schmidt v. Schmidt, 49 Misc. 2d 498, 267 N.Y.S.2d 645 (Sup.Ct. N.Y. Co. 1966) 22

School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203 (1963) 34

Whaley v. County of Tuscola, 58 F.3d 1111 (6th Cir. 1995) 18, 19, 20

Statutes and Constitutional Provisions:

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42 U.S.C. § 1983 15

Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) 15

Cited Authorities

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Fed. R. Civ. P. 12(b)(6)	15, 16
Fed. R. Civ. P. 56	16
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N.Y. Public Health L. § 4202(2)	22
USCA Const Amend. I	1, 34
USCA Const Amend. XIV, § 1	1

Other Sources:

Guidelines for Catholic Funeral Rites, at http://www.diocese-sdiego.org/Handbook/Handbook_PDFs/Liturgy8.pdf	35
About: Islam, *Islamic Funeral Rites, at http://islam.about.com/cs/elderly/a/funerals.htm*	35
Wikipedia, *Bereavement in Judaism, at http://en.wikipedia.org/wiki/Jewish_funeral#_note-3*	35

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not reported but can be found at *World Trade Center Families for Proper Burial, Inc. v. City of New York*, No. 08-3705-cv, 2009 WL 4981779 (2d Cir. Dec. 23, 2009). The Second Circuit affirmed the July 7, 2008 decision of the United States District Court for the Southern District of New York, reported at 567 F.Supp.2d 529 (S.D.N.Y. 2008). *See* Appendices A-B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Second Circuit's opinion was rendered on December 23, 2009. Subsequently, on March 5, 2010, the Second Circuit denied Petitioners' timely Petition for Rehearing *En Banc*. *See* Appendix C.

CONSTITUTIONAL PROVISIONS INVOLVED

USCA Const Amend. 1-Religion.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *

USCA Const Amend. XIV, § 1–Due Process.

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *

PRELIMINARY STATEMENT

Few could have anticipated that, on the morning of September 11, 2001, 19 men would fly airplanes into the World Trade Center's Twin Towers, the Pentagon, and the ground in Shanksville, Pennsylvania, leaving almost 3,000 innocent individuals dead in their wake. In the aftermath of the attack, the City of New York began transporting the wreckage from the fallen World Trade Center to the Fresh Kills Landfill and commenced an effort to recover both crime-scene evidence and remains of the dead. Once the world's largest garbage dump, Fresh Kills had become notorious as a rodent-infested trash pit which, at its peak, received 13,000 tons of garbage daily.

Because we, as a society, do not contemplate leaving the remains of our dead scattered amidst household garbage in perpetuity, the issue arose of what would ultimately be done with these human remains once the recovery effort concluded. Recognizing the egregiousness of allowing the status quo to continue, the City appointed a special liaison to family members of the victims who conveyed the City's promise that these human remains would not "be forgotten" and would be "maintained with reverence." Meanwhile, high-level City officials explained to family members that certain "millings" would be laid down at Fresh Kills to segregate the World Trade Center material from the garbage, so as to assure that at some future point, the World Trade Center material could be gathered and relocated.

Almost nine years later, the World Trade Center material, containing human remains of those who died on September 11th, still sits at Fresh Kills. As a consequence, Petitioners – family members of those who were killed – have been unable, for almost nine years, to recover, bury, and commune with the remains of their children, spouses, and kin in accordance with any standard of decency or tenet of religious faith.

This deprivation the Constitution does not allow, and this case presents the Supreme Court with an opportunity to so hold. Moreover, because we, unfortunately, have probably not seen the last of such attacks, this case presents the Court with an opportunity to further define the constitutional scope of, and limitations on, government action when the government undertakes to respond to future tragic, but likely inevitable, emergency situations.

STATEMENT OF THE CASE

Two thousand, seven hundred and fifty-two people were killed at the World Trade Center ("WTC") on September 11, 2001. Petitioners are seventeen individual next-of-kin, primarily parents and spouses of those killed at the WTC, and WTC Families for Proper Burial, Inc. ("WTCFPB"), an association formed by family members for the purpose of recovering the remains of their loved ones (collectively, "Petitioners"). Defendants are the City of New York ("the City"), its Mayor, Michael R. Bloomberg ("Mayor Bloomberg"), John J. Doherty, Commissioner of the New York City Department of Sanitation, and Amanda Burden, Commissioner of the New York City Department of City Planning (collectively, "Respondents").

In the immediate aftermath of the attack, material from the WTC site ("WTC debris") was transported to Fresh Kills and placed on a hill, designated as Section 1/9, so that workers could separate the metal and steel from the WTC buildings from the remainder of the WTC debris. Early on in this process, it became apparent that the WTC debris contained many human body parts and remains of those who had perished. Accordingly, a makeshift procedure was instituted to search the WTC debris for the human body parts, remains, and personal effects of these victims.

Many of those doing the searching were current or former New York Police Department ("NYPD") or Sanitation Department employees. While these individuals searched with the best of intentions, few had any forensic or archeological training related to the task at hand. Rather, in the first month after the attack, workers arriving at Fresh Kills were handed rakes and shovels and, working in teams, were directed to search through pile upon pile of WTC debris using these rakes, shovels, and, often, their hands. Any human body parts or human remains that were discovered were placed in pails, as were personal effects like credit cards or drivers' licenses, and were eventually brought to the medical examiner's station. As a result, there was never any record of where in the WTC debris any recovered remains or materials were found.

In these first weeks after the attack, after a pile had been searched in this manner, the remaining WTC debris would be bulldozed away in order to make room for additional loads of WTC debris that were arriving daily. However, this bulldozed WTC debris still contained

human body parts and human remains, as evidenced by the increasing presence of seagulls hovering overhead, attracted by the remaining human body parts. At one point, so many seagulls were encircling the bulldozed debris that the searchers were forced to shoot bottle rockets to drive them away.

At least one person involved in the initial search process, former NYPD Sergeant John Barrett ("Barrett"), stated that supervisory personnel pressured workers to search through piles hurriedly, at the expense of accuracy. Barrett recounted an incident in which, after he refused to rush through one pile of WTC debris in order to get to two other piles, the latter two piles were simply carted away and dumped, unsearched. Barrett complained to his superiors about this incident, but to no avail.

There were other shortcomings in the search process. For example, Barrett claims he never saw anybody at Fresh Kills search the numerous steel beams from the WTC for human body parts or remains before they were loaded onto trucks and transported off-site, and that, on one occasion, after a dog handler said that his dog had smelled something on a beam, Barrett checked the beam and discovered a human thigh. As well, Theodore Feaser ("Feaser"), the Sanitation Department's Director of Mechanical Operations at the site, complained that Defendants' failure to wash muddied items recovered at Fresh Kills led to the loss of much material, but was told such washing would be too costly and time-consuming.

Cognizant of the inadequacies of the process, a number of people working at Fresh Kills, including Feaser, took the position that the hand-searched WTC debris still contained so many human body parts and remains that it should not be bulldozed away, but rather, subjected to more exacting search techniques. However, Defendants did nothing to ensure that human body parts and personal effects that remained in the WTC debris were being preserved until a month later, when a more sophisticated sifting process was implemented.

On October 14, 2001, Defendants retained Taylor Recycling Facility LLC ("Taylor"), run by James Taylor ("Jim Taylor"), and Yannuzzi Disposal Services, Inc. ("Yannuzzi") to institute an organized, mechanical recovery system designed to discover human body parts, remains, and personal effects. Yet even after Taylor and Yannuzzi arrived on the scene, searching by rake and shovel continued for two more months. Moreover, the WTC debris that was searched by rake and shovel during the first 32 days of the recovery effort was never sifted using the Taylor and Yannuzzi systems.[1]

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[1] Indeed, of the approximately 1.651 million tons of WTC debris, only about 1.05 million tons, or, 63.6 per cent, were sifted using the Taylor and Yannuzzi system. Another 191,000 tons, or, 11.6 per cent, consisted of dredge spoils from the Hudson River, which were transported to the Weeks Marina in New Jersey, and 187,000 tons, or, 11.3 per cent, consisted of steel that could not be passed through the Taylor and Yannuzzi screens. Thus, approximately 223,000 tons of siftable WTC debris – 13.5 per cent – never passed through the Taylor and Yannuzzi sifting screens, even though such technology was available and had proven to be approximately 600 per cent more effective in recovering human remains from the WTC debris.

The Taylor and Yannuzzi recovery system entailed the use of specialized sifting screens that were far more discriminating than rakes and shovels. In the nine months that followed, WTC debris was run through the Taylor and Yannuzzi screens and divided into three streams of material, labeled small, medium, and large, with each stream then being searched by NYPD officers for human body parts, remains, and personal belongings.

The WTC debris that passed through the most delicate sifting screens, which sifted material down to ¼" thick, was known as fines ("fines"). As acknowledged by the Office of the New York City Medical Examiner, these fines contained the cremated human remains of WTC victims, including small tissue particles and bone fragments.

Given the sensitive nature of the fines, Defendants and officials from the Federal Bureau of Investigation ("FBI") repeatedly assured Petitioners that, notwithstanding that the fines were being kept in the same section of Fresh Kills as household garbage, they would not be commingled with either the WTC debris or with general household waste, but instead would be segregated and ultimately transported to a place of respect for proper interment. Specifically, in July of 2002, ten months into the recovery effort, some of the Petitioners visited Fresh Kills to view the recovery effort's progress. During their visit, FBI Special Agent Richard Marx ("Marx") warned them that they would see, among other things, fines, and that these fines would look like – and essentially were – cremated remains. When Diane Horning ("Diane Horning"), one of the individual Petitioners, asked for the fines for

burial purposes, Marx responded that the fines were being kept separate from both the other WTC debris and from household garbage at Fresh Kills, but could be requested when the recovery effort concluded.

The following month, in August 2002, some of the Petitioners spoke with Dennis Diggins ("Diggins"), the Deputy Director of the Sanitation Department's Bureau of Waste Disposal. Diggins informed them that "millings" had been laid down in the areas where the fines had been placed, in order to separate the fines from the household waste stored in these areas.

Based on these conversations, Petitioners believed that the fines containing the cremated remains of their loved ones had been segregated from the household garbage at Fresh Kills. Thus, as the recovery effort drew to a close, Diane Horning sent correspondence to the Office of the Mayor and to the Sanitation Department, inquiring about the City's plans to move the remains and provide a proper and decent burial site for their deceased kin.

In response, Christy Ferer ("Ferer"), who had been appointed by Mayor Bloomberg as a special liaison to the families of WTC victims, sent an e-mail stating that it was "so painful to imagine the unidentified remains of our loved ones intermingled with the debris that remains at the landfill," and noting that she was "sensitizing City Hall to the fact that this debris cannot be forgotten and that they have to plan for its future." Ferer further noted that, while moving the hill of WTC debris at Fresh Kills would be "costly," she would "reach[ ] out to private money to see if we can finance its move if and when that

becomes an option." Ferer closed by stating that the "mound of debris" to which she was referring had "been placed into one readily identified section of the landfill reserved just for this purpose. It weighs 1.8 million tons. Officials at Fresh Kills assure me it has been set aside and maintained with reverence. The 2 visits I have made there confirmed that."

Notwithstanding Ferer's assertions, Petitioners learned that, while the recovered fines were initially segregated from other WTC debris and household garbage on a daily basis, at some point thereafter, Sanitation Department officials decided to simply recombine the fines with other WTC debris. Moreover, notwithstanding what Petitioners had been told, no millings were ever set down to separate the WTC debris (which now contained the fines) from the garbage and other waste already present at Fresh Kills, even though months had passed since the immediacy of the attack. Rather, Petitioners, through their own investigation, learned from Eric Beck, who served as Jim Taylor's Senior Supervisor at Fresh Kills, that, in the months after September 11th, the City loaded some of the fines "onto tractors, and us[ed] it to pave roads and fill in potholes, dips and ruts" on the delivery roads at Fresh Kills.

In an effort to rectify this situation, the Petitioners formed WTC Families for Proper Burial ("WTCFPB") in November of 2003 as a not-for-profit corporation

> "organized, and . . . operated exclusively for the following purposes: To retrieve human tissue remains, bone fragments and cremated

> remains of those killed on September 11, 2001 at the World Trade Center, which are currently in the Fresh Kills Landfill in Staten Island, NY. The World Trade Center (WTC) Families for Proper Burial, Inc. proposes that these retrieved remains be put into suitable containers and buried properly, with dignity, preferably at the site of the WTC memorial."

WTCFPB acts on behalf of approximately 1,000 families who lost loved ones at the WTC on September 11th. Since its inception, almost 66,000 people, including over 1,000 family member, have signed its petition to have the human body parts and human remains of 9/11 victims removed from Fresh Kills and relocated to a suitable burial site, and the association has received hundreds of endorsements from, *inter alia*, U.S. Senators and Representatives, Governors, over 150 New York and New Jersey municipalities through town resolutions, and many religious, military and civic organizations. However, neither the individual Petitioners nor the WTCFPB have been able to convince the City to simply gather and relocate the fines and WTC debris to a more appropriate site.[2]

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[2] Petitioners emphasize that, while they have, in the past, sought to have all of the WTC debris sifted using the Taylor and Yannuzzi systems, the instant Petition, and any further litigation in this action should this Petition be granted, seeks only to have the WTC debris and fines relocated to a proper burial site. That said, were the City willing to resift all of the WTC debris using the Taylor and Yannuzzi recovery system, Petitioners would be amenable to this.

The search and recovery effort at Fresh Kills concluded in August of 2002. Approximately one and one-half years later, in March of 2004, the New York City Planning Commission ("City Planning Commission") held a public meeting regarding the proposed redevelopment of Fresh Kills into a municipal park. Petitioners, who were concerned that any such redevelopment would cause their loved ones' remains to be buried at Fresh Kills forever, attended the meeting and voiced their position that allowing the body parts of their deceased family members to permanently remain in a landfill on top of household waste was unacceptable.

Notwithstanding Petitioners' objections, on July 19, 2004, the Office of the Mayor delivered a letter to WTCFPB stating that the fines would not be unearthed from their location at Fresh Kills, but promising that WTCFPB could offer input regarding the design of a monument to be located on the grounds of the planned park. The letter did not give any timetable for Fresh Kills' redevelopment, but, by the City's own estimate, this process will take thirty years – in other words, beyond the lifetime of many of the Petitioners. The letter also stated that "there is no site at present to receive the [remains]" – despite the fact that Petitioners had already discussed proposed relocation sites with numerous entities, including the State of New Jersey and the NY/NJ Port Authority, and had proposed several potential alternative sites for the WTC debris.

WTCFPB requested a meeting with Mayor Bloomberg to discuss the issues raised in the July 19, 2004 letter, but received no response. Then, at an August 2004 visit to Fresh Kills Section 1/9, WTCFPB

family members discovered that, far from being maintained "with reverence," as promised by Defendants, the area bore signs of severe erosion and tracks from large construction vehicles, and was littered with chunks of steel, shoes, tires, carpets, storm drains, and other garbage. Shortly thereafter, on August 10, 2004, Petitioners appeared before the City Planning Commission, described their recent findings, and reasserted their position that their loved ones' remains had to be unearthed and relocated before Fresh Kills could be redeveloped. City Planning Commission officials gave Petitioners verbal assurances that no further construction would occur at Section 1/9 of Fresh Kills. However, two days later, on August 12, 2004, the Sanitation Department began covering Section 1/9 with dirt as part of a final, "capping" procedure, commenced on or about September 9, 2004, to close and redevelop Section 1/9.

In October 2004, Petitioners attended another public meeting during which the City Planning Commission announced that it had ordered Section 1/9 of Fresh Kills cleaned of debris. Petitioners informed the City Planning Commission that, rather than being cleansed of garbage, the area was merely being covered with another foot of dirt, thus permanently commingling human body parts, remains, and fines with household garbage and burying both at Fresh Kills. The City Planning Commission refused to address Petitioners' assertions.

Accordingly, in October 2004, Petitioners filed a Notice of Claim with the City, seeking to assert their rights over the unrecovered remains of their deceased

loved ones. On March 11, 2005, the WTCFPB, through counsel, sent a letter to Mayor Bloomberg outlining the group's concerns about the disposition of their loved ones' remains and requesting a meeting to discuss these issues. Although Mayor Bloomberg did not meet with the group, his Corporation Counsel and Sanitation Department officials did, but to no avail.

To date, many WTCFPB family members have been and continue to be deprived of some or all of their loved ones' human remains, thus depriving them of any opportunity to possess and bury their next-of-kin in a manner of their religious, spiritual, or personal choosing.[3] Diane Horning, for example, received only her son Matthew's wallet and a fragment of his occipital skull bone, recovered from the WTC debris at Fresh Kills.

Moreover, Petitioners have been denied meaningful access to the Fresh Kills site. Simply visiting the site requires that one comply with a labyrinth of changing regulations set by Defendants, which effectively impedes Petitioners' efforts to commune with and mourn their loved ones. In 2002, for example, the Office of the Mayor notified Petitioners that, in order to visit, they had to contact that office in writing or via e-mail one to two weeks in advance, indicating who would be visiting, the visitor's relationship to the deceased, and the date and time of the proposed visit. Later, the process was

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[3] Of the 2,752 who perished at the WTC, only about 176 full bodies (6 per cent) have been recovered from the WTC debris. Partial remains of approximately 1,450 bodies (53 per cent) have been recovered, and no remains at all have been recovered for approximately 1,123 victims (41 per cent).

changed and Petitioners had to contact the Sanitation Department in order to access the site. At that point, Petitioners were told that only family members could visit, and non-family members, such as journalists or photographers, would be denied access. Diane Horning requested a written policy spelling out this rule, only to be told by a Sanitation Department employee told that no such written policy existed but that the City had unilaterally decided that journalists, "would disturb the sanctity of the space."

Once someone receives clearance to visit Fresh Kills, he or she must drive to the site, as there is no public transportation. The drive is not scenic; rather, the route is lined by recycling and methane recovery plants. At the entrance to the site, a sign announces that household waste is dumped there. Petitioners must stop at a guard booth, check in, identify themselves, and await an official escort, who leads them to Sanitation Department trailers where Petitioners sign a waiver indemnifying the City from liability should anyone be injured during the visit. Only then are Petitioners driven by Sanitation Department employees to the top of the garbage dump so that they can visit and mourn their loved ones.

Because of the rough terrain and soil erosion – sometimes as deep as four feet – children, the elderly, and the infirm cannot be brought to the site. In the summer, insects swarm overhead, and on some days, the stench of methane is too much to bear. There is no place to leave flowers, no feeling of solace or closeness to a loved one. On various visits, Petitioners have found old tires, carpeting, pieces of blistered steel and fire hose,

construction fill, glass, bolts, tiling, and shoes. It is abundantly clear that the site has not been maintained "with reverence," as promised.[4]

Procedural History

Petitioners filed a Complaint seeking to remedy their injuries in August 2005 and filed an Amended Complaint ("Complaint") in June 2006.[5] The Complaint raised six claims – two constitutional due process claims, a claim based upon New York common law, a free exercise claim, a claim based upon New York statutory law, and a negligence claim – and sought declaratory and injunctive relief, not money damages.

In October of 2006, Defendants moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the Complaint or, in

[4] In contrast, the remains of some of the Pentagon victims, including unidentified remains that were never associated with specific victims, have been buried together in a special casket at Arlington National Cemetery, marked with a special headstone, and those who died when Flight 93 crashed to the ground in Shanksville, Pennsylvania, are being honored by the Flight 93 National Memorial, which includes a "Sacred Ground" which is the final resting place of the passengers and crew.

[5] The district court had subject matter jurisdiction over the Complaint pursuant to 28 U.S.C. §§ 1331, 1343(a)(3)-(4), and 42 U.S.C. § 1983. In addition, the district court had subject matter jurisdiction pursuant to Section 408(b)(3) of the Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001), which provides that the Southern District of New York shall have exclusive jurisdiction over claims "resulting from or relating to the terrorist-related aircraft crashes" of September 11, 2001.

the alternative, for partial summary judgment pursuant to Fed. R. Civ. P. 56 on Plaintiff's second, fifth, and sixth claims. In support of their motion, Defendants submitted affidavits from several individuals involved with the recovery effort.

Petitioners opposed Defendants' motion and submitted affidavits and exhibits from both Petitioner Diane Horning and numerous individuals involved with the recovery effort. Petitioners' affidavits tell a vastly different story with respect to adequacy and thoroughness with which the Fresh Kills recovery effort proceeded, the decision-making processes in place, and the promises made to Petitioners regarding the ultimate disposition of the fines and WTC debris. Defendants filed a Reply Brief accompanied by two additional affidavits and several exhibits, which, again, paint a different picture than that painted by Petitioners' submissions.

On July 8, 2008, the district court issued its Opinion, granting Defendants' motion and dismissing the Complaint.[6] *See* Appendix B. In its Opinion, the district court held, *inter alia*, that Petitioners had not established that they had a constitutional property interest in the remains in question because said remains were unidentifiable, and that Petitioners' free exercise rights had not been violated because Defendants' actions were not targeted to infringe upon any specific religious practice and thus, any such burden was incidental. *Id.*

[6] It is not entirely clear whether the district court did so pursuant to Defendants' Rule 12(b)(6) motion or Defendants' alternative motion for summary judgment.

Petitioners timely filed their Notice of Appeal on July 25, 2008. On December 23, 2009, the Second Circuit issued a Summary Order affirming the Opinion of the district court.[7] *See* Appendix A. On January 27, 2010, Petitioners timely filed a Petition for Rehearing *En Banc*, which the Second Circuit denied on March 5, 2009. *See* Appendix C.

REASONS FOR GRANTING THE PETITION

POINT I

THIS CASE PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION REGARDING THE DUE PROCESS PROPERTY INTEREST IN UNIDENTIFIALBLE REMAINS OF NEXT-OF-KIN

In upholding the district court's decision dismissing Petitioners' Complaint, the Second Circuit concluded that Petitioners did not have a constitutional due process property right to possess the unidentified remains of their next-of-kin for burial purposes. At least two Circuit

[7] In so holding, the Second Circuit noted that the Petitioners had standing to bring their action because two individual Petitioners, Diane and Kurt Horning, had been given a fragment of their late son Matthew's occipital bone, recovered in the WTC debris at Fresh Kills, and that, given this, "other Petitioners' standing is not a threshold constitutional question, and we may consider the merits." *See* Appendix A at 4a-5a (*citing Rumsfeld v. Forum for Academic & Inst. Rights, Inc. (FAIR)*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.").

Courts, the Sixth and the Ninth Circuits, have found a due process property interest in the identifiable remains of next-of-kin. Thus, this case raises the important constitutional question of what to do where a property interest that would otherwise unquestioningly be present simply cannot be, not because of any fault of the putative interest-holder, but because of the circumstances that led to their loved one's death. Put another way, must family members of deceased loved ones waive an otherwise valid property interest that would enable them to bury their dead because, owing to the circumstances of the tragedy, their loved ones remains are individually unidentifiable but known to be present in a specific location?

A. *Two Circuit Courts Have Found A Constitutional Due Process Interest In The Remains Of Next-Of-Kin Based in State Law*

Both the Sixth and Ninth Circuits have concluded that the Fourteenth Amendment's Due Process Clause encompasses and protects a property interest that one has in the remains of next-of-kin. In *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991), and again in *Whaley v. County of Tuscola*, 58 F.3d 1111 (6th Cir. 1995), the Sixth Circuit held that a deceased's relative had a constitutionally protected property interest in the deceased's body itself. The Ninth Circuit held similarly in *Newman v. Sathyavaglswaran*, 287 F.3d 786, 796-97 (9th Cir. 2002), concluding that parents had a property interest in the corneas of their deceased children pursuant to the Due Process Clause of the Fourteenth Amendment. *See also Melton v. Hamilton County*, 267

F.Supp.2d 859 (S.D. Ohio 2003); *Mansaw v. Midwest Organ Bank*, No. 97-9271-CV-W-6, 1998 U.S. Dist. LEXIS 10307 (W.D. Mo. 1998).

In so holding, the Sixth and Ninth Circuits cited this Court's decision in *Board of Regents v. Roth* for the proposition that "property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." 408 U.S. 564, 571-72 (1972). Rather, such interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577.

Based on this, the Sixth and Ninth Circuits looked to state law to determine whether a constitutionally protected property interest in the remains of next-of-kin existed. In *Brotherton*, for example, the Sixth Circuit noted that, "the aggregate of rights granted by the state of Ohio to Deborah Brotherton rises to the level of a 'legitimate claim of entitlement' in Steven Brotherton's body, including his corneas, protected by the due process clause of the fourteenth amendment." 923 F.2d at 482. In *Whaley*, the Sixth Circuit arrived at its conclusion based on Michigan statutory and common law, which granted next-of-kin the right to possess, bury, or dispose of a deceased's body and prevent its mutilation. 58 F.3d at 1116. And, in *Newman*, the Ninth Circuit found that a due property interest in human remains existed based on California statutory law granting parents the right to transfer, or refuse transfer, of their deceased children's body parts. 287 F.3d at 296.

In arriving at their decisions, it was of no moment to either court that the underlying interest granted by the relevant state was termed a "quasi-property" interest. *See Brotherton*, 923 F.2d at 482 (rights of next of kin in Ohio "form a substantial interest in the dead body, regardless of Ohio's classification of that interest"); *Whaley*, 58 F.3d at 1114 (whether substantive interest created by the state rises to the level of a constitutionally protected property interest is a question of federal constitutional law and, in making such a determination, "courts must look beyond the law's nomenclature and to its substance"). As the Ninth Circuit noted:

> Our holding is not affected by California's labeling of the interests of the next of kin as "quasi property," a term with little meaningful legal significance. "Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim or entitlement' protected by the Due Process Clause."

Newman, 287 F.3d at 297 (*quoting Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 9 (1978)). Thus, so long as the relevant state law provides for a property or quasi-property interest in the remains of next-of-kin, a party can assert a constitutionally-protected property interest under the Fourteenth Amendment.

B. *New York Law Provides For A Property Interest In The Remains Of Next-of-Kin*

It is undisputed that New York has long recognized the right of next-of-kin to take immediate possession of a decedent's body and arrange for its disposition. *See Colavito v. New York Organ Donor Network, Inc.*, 356 F.Supp.2d 237, 243 (E.D.N.Y. 2005) (recognizing spouse's "quasi-property" right to possess body for purpose of ensuring proper burial); *Helmer v. Middaugh*, 191 F.Supp.2d 283, 286 (N.D.N.Y. 2002) (property interest in a deceased body is the right to possess the body for burial, control disposal of the body, and maintain claim for disturbances to the body); *Melfi v. Mount Sinai Hosp.*, 64 A.D.3d 26, 31, 877 N.Y.S.2d 300, 304 (1st Dep't 2009) ("[i]t is well established that the common-law right of sepulcher gives the next of kin the absolute right to the immediate possession of a decedent's body for preservation and burial"); *Booth v. Huff*, 273 A.D.2d 576, 577, 708 N.Y.S.2d 757, 759 (3d Dep't 2000) (same); *Dick v. City of New York*, No. 607/00, 2002 WL 31844745, at *2 (N.Y. Sup. Oct. 30, 2002) ("the courts of this State have long recognized the 'quasi-property right' of a spouse or next of kin to the possession of a decedent's body, in the state that the body was in at the moment of death, for the purpose of interment, or disposal according to custom or religious belief"); *Darcy v. Presbyterian Hospital in City of New York*, 202 N.Y. 259, 262-263 (1911) (right to possess dead body for the purpose of preservation and burial belongs to surviving spouse or next of kin).

Notably, one New York appellate court, the Second Department, extended this "quasi-property right" to the

partial remains of those who died at the WTC on September 11th. *See Caseres v. Ferrer*, 6 A.D.3d 433, 434, 774 N.Y.S.2d 372, 373 (2d Dep't 2004). In so holding, the *Caseres* Court, citing the right of family members to decedent's remains, directed that the partial remains of a man killed on September 11th be given to his eldest surviving sister, noting that the "only people who have standing to seek possession of the remains for 'preservation and burial' are his surviving next of kin." *Id.* (referencing § 205.01[d] of the Rules of the City of New York, regarding a next-of-kin's right to give "instructions regarding the disposal of a decedent's remains").

Moreover, New York law makes no distinction between cremated remains and an intact body. The state's Public Health Law provides that "every body of a deceased person, within this state, shall be decently buried or incinerated within a reasonable time after death," and defines "cremated remains" as "human remains after incineration in a crematory." *See* N.Y. Public Health L. §§ 4200(1), 4202(2) (McKinney's 1987). Following from this, New York courts have recognized the next-of-kin's quasi-property right to possession of a decedent's cremated remains. *See Roach v. Stern*, 252 A.D.2d 488, 491, 675 N.Y.S.2d 133, 135 (2d Dep't 1998) (recognizing cause of action for interfering with next-of-kin's right to dispose of cremated remains); *Schmidt v. Schmidt*, 49 Misc. 2d 498, 499, 267 N.Y.S.2d 645, 646 (Sup.Ct. N.Y. Co. 1966). Thus, under New York law, Petitioners have a property interest in the remains of their next-of-kin.

C. *The Second Circuit Wrongly Rejected Petitioners' Due Process Claim Because The Purpose Behind The Due Property Interest Can Be Effectuated Even Absent The Identification Of Remains*

In light of New York's recognition of next-of-kin's right to take immediate possession of a decedent's body and arrange for its disposition, the Second Circuit could have recognized Petitioners' due process property interests in the remains of their loved ones. It did not do so, however, instead affirming the district court's holding that, "under New York law, Petitioners do not have a cognizable property right in unidentifiable human remains."

That the circumstances of this case prevent such identification does not change the fact that Petitioners – like any next-of-kin – wish to have some remnant of their loved ones to bury, however imperfectly. In this way, Petitioners are no different than any other party who seeks to obtain the remains of their loved ones for burial purposes, and their constitutional rights should not be diminished because the circumstances of their loved ones' death limit their recovery to WTC debris containing their loved ones' remains rather than actual, specific bones.

As an initial matter, Petitioners' inability to identify the remains of their loved ones is in part the result of affirmative decisions made by Defendants that were beyond Petitioners' control. It was the City's decision to commingle the WTC debris with household garbage at Fresh Kills, notwithstanding its promises to the contrary, and to subsequently bury the WTC debris

under an additional layer of dirt and effectively trap the human remains at Fresh Kills. Indeed, part of what Petitioners seek in attempting to take discovery are answers with respect to how, when, and why such decisions were made – decisions which have wrenched at Petitioners' hearts for years and hindered their ability to find solace in their loss.

More to the point, the same rationale behind protecting a property interest in identifiable remains – to allow for a proper and dignified burial – is present here, even if the remains themselves are unidentifiable. It is undisputed that the WTC debris at Fresh Kills contains the remains of WTC victims. The City itself acknowledged this in a letter from the Office of the New York City Medical Examiner, dated January 9, 2003 (months after the recovery effort at Fresh Kills had concluded), which noted that the fines at Fresh Kills contained cremated human remains of WTC victims, including small tissue particles and bone fragments. And, in July of 2002, as the recovery effort was coming to a close, Mayor Bloomberg's liaison to the WTCFPB families conceded that human remains of WTCFPB family members were located amidst the debris at Fresh Kills and noted how "painful" it was "to imagine the unidentified remains of our loved ones intermingled with the debris that remains at the landfill."

Moreover, two Petitioners – Diane and Kurt Horning – were given a fragment of their late son Matthew's occipital skull bone, which had been found amidst the WTC debris sifted at Fresh Kills. The logical conclusion to draw from this – essentially, a *res ipsa loquitur* argument – is that at least some of Matthew's other

bone fragments and remains would have been located in nearby debris, as would many remains from the 2,576 WTC victims (or, 94 per cent) whose bodies have gone either wholly or partially missing for the last nine years. Indeed, the Second Circuit's determination that Diane and Kurt Horning had standing to bring the instant action and, "[t]hat being so, other Petitioners' standing is not a threshold constitutional question, and we may consider the merits," supports the notion that the remains of other Petitioners' next-of-kin are also buried among the WTC debris at Fresh Kills, for to find that one had standing based on the presence of "unidentifiable" remains but no property interest in said remains defies logic. *See* Appendix A at 4a 5a.

Finally, affidavits from individuals who worked on the recovery effort lend credence to the notion that many human remains are still buried at Fresh Kills. Barrett attested that, in the six weeks he sifted debris at Fresh Kills, he "must have located easily 50 or more small pieces of bone," that he discovered human body parts and human remains "[e]very day," that he estimated that, in an average month, each worker at Fresh Kills "probably located 50 pieces of human body parts and human remains each," and that, due to "consistent pressure to move quickly," the effort to recover human remains was inadequate and caused many such remains to go undiscovered. Feaser averred that, "if the City of New York unearthed, resifted, and washed the debris at Fresh Kills, Section 1/9, it would find hundreds of human body parts and human remains." And Jim Taylor, whose company's sifting machines sifted the WTC debris at Fresh Kills as of October 2001 attested, "[f]rom my own experience at

Fresh Kills and based on what I now believe happened there, I am strongly convinced that if the City of New York would unearth and resift the debris at Fresh Kills Section 1/9, they would find many human body parts and human remains."

Given the unanimity of opinion with respect to the presence of human remains amidst the WTC debris at Fresh Kills, the inability to link these remains to specific victims does not change the fact that the excavation and transfer of the WTC debris to a more dignified resting place would enable Petitioners to bury and mourn their loved ones in an appropriate fashion. Indeed, the City has asserted throughout that it knows the exact location of the WTC debris at Fresh Kills because Sanitation Department surveyors recorded daily GPS coordinates, making such excavation and transfer possible. Accordingly, this Court should grant the instant petition and consider whether, when the due process property interest in a loved one's remains is at stake, specific identification of the remains themselves is necessary where the interest's purpose may be effectuated even absent such identification.[8]

[8] Indeed, the mass grave at Arlington National Cemetery, honoring those who died at the Pentagon on September 11th, contains both identified and unidentified human remains.

POINT II

THIS CASE PRESENTS IMPORTANT CONSTITUTIONAL QUESTIONS RELATED TO THE SCOPE OF, AND LIMITATIONS ON, GOVERNMENTAL RESPONSIBILITY IN THE CONTEXT OF EMERGENCY SITUATIONS

In addition to the due process issue discussed *supra*, there is another pressing reason why this Court should grant certiorari in this matter. The facts and circumstances underlying the instant action were related to the terrorist attack on September 11th. While it is unfortunate (and scary) to concede, there is a significant likelihood that the United States will be beset by another such attack at some future point. Indeed, at the time of this writing, a federal court hearing was being conducted in southern Manhattan related to the most recent terrorist incident, involving a bomb planted in Times Square.

Moreover, since September 11th, the United States has endured numerous natural disasters that have occasioned a massive governmental response. In 2005, Hurricane Katrina hit the Gulf Coast, bursting New Orleans' levees and flooding 80 per cent of that city and 90 per cent of the nearby Mississippi beach towns, and leaving at least 1,836 dead and one million dispossessed in its wake. In October of 2007, a series of wildfires in Southern California destroyed 1,500 homes and 500,000 acres of land, forcing the evacuation of approximately one million people and prompting a massive federal, state and local response. And, on April 20, 2010, an explosion aboard the Deepwater Horizon offshore oil rig

caused a massive oil spill that has been leaking an estimated 5,000 gallons of oil per day into the Gulf of Mexico.

Such national emergencies, whether caused by nature or man, will undoubtedly continue to plague our country and require some manner of governmental response. Given this, just as there is a need for clarity with respect to the due process property interest in unidentifiable human remains in a world that may again present such a tragedy, so is there a need for clarity with respect to exactly what the government's constitutional due process responsibilities are – and are not – when it affirmatively assumes a duty to act in response to an emergency. This case presents the Court with an opportunity to provide such clarity.

A. *A Ruling In This Case Could Help Clarify What Constitutes A "Special Relationship" Triggering The Protections Of The Due Process Clause*

This Court's holding in *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989), stands for the proposition that the Due Process Clause imposes no affirmative duty on the State to provide services or protection, but, rather, limits the State from causing deprivations of life, liberty, and property without due process of law. In so holding, the *DeShaney* Court acknowledged that a "special relationship" created or assumed by the State might give rise to an affirmative constitutional duty to protect, enforceable through the Due Process Clause, but that any such affirmative duty would arise out of the limitations imposed by the State upon the individual as a result of the special relationship.

Before the district court and the Second Circuit, Petitioners argued that the City had created and/or assumed such a "special relationship" with them because the City: (1) in the immediate aftermath of the attack, took control of the WTC debris at Ground Zero and transported it to Fresh Kills; (2) assumed jurisdiction over Fresh Kills, and the WTC debris therein, such that Petitioners had and still have no general access to Fresh Kills, but rather, must arrange any visits with the City; (3) designed, implemented, operated, and managed the recovery effort pursuant to which the WTC debris was sifted and human remains were recovered – an effort Petitioners contend was inadequate; (4) specifically appointed a liaison to the WTCFPB members, who, on behalf of the City, communicated promises with respect to how the fines and WTC debris would be segregated from the household garbage, treated and maintained; (5) violated those promises and actually co-mingled the WTC debris and fines with household garbage; and (6) made all decisions related to the proposed transformation of Fresh Kills to a park, including the decision to bury the WTC debris and fines under a layer of dirt as part of a "capping" procedure that would trap Petitioners' loved ones' remains at Fresh Kills in perpetuity.

In all of these ways, the City interposed itself between Petitioners and the remains of their next-of-kin and then limited the former's access to the latter, controlled how (and, to some extent, what) remains would be recovered, made promises regarding how it would be undertaking the obligations it had voluntarily assumed (which were later found to have been broken), and, ultimately made decisions regarding the permanent

fate of the remains. In so doing, the City affirmatively created a "special relationship" with Petitioners pursuant to which the City retained control over, and limited access to, Petitioners' property interests.

The Second Circuit and district court disagreed with this analysis. However, given the nature of the emergencies that increasingly beset our nation, it is worth asking what the government's obligations and duties would be under the Due Process Clause should it have to, for example, evacuate hundreds of individuals, relocate them to an emergency shelter in a stadium or other large setting, and undertake to secure the safety of these individuals while at the shelter. Similarly, a situation might arise in the context of an environmental disaster, where the government affirmatively undertook to curtail the cause of the disaster, only to have its efforts result in some sort of due process deprivation. In such cases, additional clarification from this Court could prove useful both in defining the contours of what constitutes a "special relationship" and in helping governmental decision-makers determine what, if any, actions should be undertaken and how such actions should be implemented so as to provide for the greatest protection of life, liberty, and property.

B. *This Case Could Clarify for Government Actors When Post-Deprivation Hearings Satisfy Due Process And When Pre-Deprivation Hearings Are Necessary*

The procedural due process prong of the Fourteenth Amendment prohibits the State from depriving an individual of his or her constitutionally protected property interest without due process of law. *See Daniels v. Williams*, 474 U.S. 327, 331 (1986). A State violates procedural due process when it deprives an individual of a property interest without first providing some sort of hearing. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) ("'[T]he root requirement' of the Due Process Clause" is "'that an individual be given an opportunity for a hearing before he is deprived of any significant protected interest'") (emphasis in original) [internal quotation omitted]); *Memphis Light, Gas & Water Div.*, 436 U.S. at 18 (hearing required before utility service cut off); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (hearing required before termination of welfare benefits).

However, courts have recognized an exception where a deprivation results "because of a random, arbitrary act by a state employee," so long as the state "provides a meaningful postdeprivation remedy." *Hellenic American Neighborhood Action Committee v. City of New York*, 101 F.3d 877, 880 (1996) (*citing Hudson v. Palmer*, 468 U.S. 517, 533 (1984)). In such instances, post-, rather than pre-deprivation remedies have satisfied due process because "[i]t is difficult to conceive of how the State could provide a meaningful hearing

before the deprivation takes place." *Hudson*, 468 U.S. at 533. Thus, property deprivations resulting from decisions made in the rush of crisis, or by low-level officials, are countenanced so long as a meaningful postdeprivation hearing process exists. *See Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 299-300 (1981) (postdeprivation hearing satisfied procedural due process where decision to stop mining operation was based on discovery of immediate danger); *DiBlasio v. Novello*, 344 F.3d 292, 304 (2003) ("'random and unauthorized' exception to the requirement of a pre-deprivation hearing does not apply where the government actor in question is a high-ranking official with 'final authority over significant matters.'") [internal citation omitted].

There was nothing random or arbitrary about the decisions Petitioners are challenging. The City's decision not to use the Taylor and Yannuzzi screens to sift the WTC debris that was searched by rake and shovel during the first 32 days of the recovery effort was not made in a random or hasty fashion, but rather, by high-ranking officials during the ten-month period that followed September 11th.[9] Likewise, the City's decision to renege on its promise and commingle the WTC debris and fines with household garbage was made long after September 11th, as Petitioners were informed by federal and City officials as late as July and August of 2002 that the WTC debris was being segregated from the

[9] Petitioners note that Defendants dispute the allegation that the WTC debris that arrived at Fresh Kills during the first 32 days of the recovery effort was not sifted using the Taylor and Yannuzzi systems.

household garbage via "millings" and that the fines were being further segregated from the WTC debris. Finally, the decision to spead a layer of dirt over the commingled WTC debris and fines in August of 2004 was made years after the actual attack.

In sum, numerous monumental decisions reflecting City policies with respect to the WTC debris at Fresh Kills were made, not by low-level officials in the chaos that immediately followed September 11th, but in the calm of the months and even years thereafter, by those with significant decision-making power.[10] Notably, while Defendants allotted two years for the Fresh Kills recovery effort, those involved with the project were pressured to work quickly, and the effort was actually completed in 11½ months – leaving ample time to ensure that the WTC debris had been adequately sifted and was being properly segregated, had this been Defendants' intention.

In light of Petitioners position that they have a property interest in the remains of their next-of-kin notwithstanding the unidentifiability of the remains, the denial of such property without any sort of a hearing violates procedural due process. Accordingly, should this Court grant certiorari to consider whether unidentifiable human remains can form the basis of a property interest, the Court could then decide this issue as well.

[10] Of course, the very reason Petitioners seek discovery is to learn exactly who made these decisions and when and why, so as to give further substance to the claims in the Complaint – the very point of the discovery process.

However, even if the Court declines to address this, the instant case presents an opportunity to give further guidance related to the question of what satisfies procedural due process in an emergency context. Specifically, the Court could further clarify what constitutes a "random, arbitrary act by a state employee" reviewable at a post-deprivation hearing and what types of situations require pre-deprivation hearings. As noted *supra*, the virtual guarantee of significant future crises requiring governmental intervention renders such guidance imperative.

POINT III

THIS CASE PRESENTS AN OPPORTUNITY TO RULE ON THE FREE EXERCISE ISSUES RELATED TO THAT MOST CENTRAL OF RELIGIOUS PRACTICES – THE BURIAL OF THE DEAD

Finally, this case raises an important question in the context of Free Exercise jurisprudence, namely, how central is death and the burial ritual to religious practice? The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]," *see* U.S. Const. amend. I, and is intended to "secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 222-23 (1963).

Petitioners wish to bury their loved ones in a manner consistent with their religious beliefs. Though burial and funeral rituals differ by faith, almost all of the world's

major religions have detailed rituals for burying and treating the dead, many of which stress the need to treat a deceased's body with respect.[11] It cannot be said that this has happened here. Rather, as a result of the "invasions . . . by civil authority," to wit, Defendants' inadequate search of, and failure to segregate, the WTC debris from common household garbage, failure to excavate and return said WTC debris to Petitioners, and failure to relocate the WTC debris containing human remains to a more respectful site, Petitioners have been denied the right to bury, honor, and mourn their loved ones in accordance with the tenets of their religious faith. In this most personal and meaningful way, Petitioners' Free Exercise rights have been substantially burdened.

The Second Circuit took a different view, applying the standard enunciated in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881 (1990), which held that any incidental burden to religious expression imposed by a general rule, policy, or statute of general applicability did not amount to a First Amendment violation. Yet the inability to bury one's loved one in accordance with one's religious tenets is no mere "incidental burden." Petitioners describe in

[11] For descriptions of the burial rituals of different faiths, *see Guidelines for Catholic Funeral Rites*, *at* http://www.dioceseofsdiego.org/Handbook/Handbook_PDFs/Liturgy8.pdf (describing Catholic burial ritual and noting that "[c]remated remains should be treated with the same respect given to the remains of a human body"); Wikipedia, *Bereavement in Judaism*, *at http://en.wikipedia.org/wiki/Jewish_funeral#_note-3* (describing Jewish burial ritual); About: Islam, *Islamic Funeral Rites*, *at http://islam.about.com/cs/elderly/a/funerals.htm* (describing Muslim burial ritual).

detail the anguish they suffer in having to travel to a former mass garbage dump just to commune with their dead. They speak of bureaucratic regulations and clearances as a precondition to any visit, a site littered with old tires, carpeting, pieces of steel and fire hose, glass, and shoes, swarming insects, and the stench of methane. Mostly, they decry the utter lack of dignity that does scant justice to their sons, daughters and spouses.

One would be hard-pressed to think of an aspect of religious practice more central than the burial of the dead. To deem the denial of the right to obtain and properly bury the remains of one's loved ones an "incidental burden" trivializes loss itself. By granting this petition and hearing this case, this Court can hold forth on what the minimal standards must be, under the Constitution, such that practices central to religious faith are secured.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

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Respectfully submitted,

NORMAN SIEGEL
Counsel of Record
260 Madison Avenue,
18th Floor
New York, NY 10016
(212) 532-7586
siegel@mclaughlinstern.com

STEVEN J. HYMAN
AIMEE E. SAGINAW
MCLAUGHLIN & STERN, LLP
260 Madison Avenue
New York, NY 10016
(212) 448-1100

Attorneys for Petitioners